Supreme Court, U.S.
FILED

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No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, CROSS-PETITIONER

v.

BOEING SALES CORPORATION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Boeing Sales Corporation (cross-respondent) is a "foreign sales corporation" within the meaning of the provisions of the Internal Revenue Code that formerly pertained to the taxation of such entities, 26 U.S.C. 921-927 (1988). Cross-respondent joined with its parent, The Boeing Corporation, and the latter's consolidated subsidiaries (petitioners in No. 01-1209), in bringing this tax refund suit. This suit challenges the validity of the Treasury regulation (26 C.F.R. 1.861-8(e)(3) (1979)) that governs the application of research and development expenses in the computation of the "combined taxable income" of cross-respondent and its parent (and affiliates) under the foreign sales corporation provisions of the Code. After the district court ruled that research and development expenditures need not be taken into account in the manner specified by that regulation, the parties agreed that the court's ruling, if valid, would (as a computational matter) result in an increase in cross-respondent's tax liabilities for the period in issue as well as a decrease in the tax liabilities of Boeing and its consolidated subsidiaries. Subject to the retained right to appeal, the parties therefore stipulated to entry of a judgment against the former and in favor of the latter. On cross-appeals, the court of appeals concluded that the regulation properly governed the treatment of research and development expenses and therefore reversed the district court judgment in favor of petitioners in No. 01-1209 and against Boeing Sales Corp. Petitioners in No. 01-1209 seek certiorari on that issue.

The question presented by this conditional cross-petition is whether, if certiorari is granted and the judgment is reversed in No. 01-1209, the judgment of the court of appeals in favor of cross-respondent should then also be reversed.

PARTIES TO THE PROCEEDINGS

The parties in this case are The Boeing Company and Consolidated Subsidiaries and Boeing Sales Corporation. Boeing Sales Corporation is a wholly-owned subsidiary of The Boeing Company. No publicly held company owns 10% or more of The Boeing Company's stock.

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The Solicitor General, on behalf of the United States, respectfully cross-petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a)* is reported at 258 F.3d 958. The opinion of the district court (Pet. App. 15a-24a) is unreported.

* References to "Pet. App." are to the appendix to the petition for a writ of certiorari in *The Boeing Company & Consolidated Subsidiaries* v. *United States*, No. 01-1209.

JURISDICTION

The judgment of the court of appeals was entered on August 2, 2001. A petition for rehearing was denied on November 19, 2001 (Pet. App. 25a). The petition for a writ of certiorari in *The Boeing Company & Consolidated Subsidiaries* v. *United States*, No. 01-1209, was filed on February 15, 2002, and was placed on this Court's docket on February 21, 2002. This conditional cross-petition is being filed pursuant to Rule 12.5 of the Rules of the Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The facts and proceedings below are set forth in the petition in *The Boeing Company & Consolidated Subsidiaries* v. *United States*, No. 01-1209. An issue presented in No. 01-1209 and here concerns the treatment to be afforded to research and development expenses incurred by corporations that make sales through affiliated entities known as "foreign sales corporations" under the provisions of 26 U.S.C. 921-927 (1988). In particular, the issue addressed concerns the way in which research and development expenses are to be accounted for in determining the "combined taxable income" derived from such sales, as that term is used in 26 U.S.C. 925(a).

Boeing Sales Corporation (cross-respondent) is a "foreign sales corporation" within the meaning of this statutory regime. Cross-respondent joined with its parent, The Boeing Company, and that company's consolidated subsidiaries (petitioners in No. 01-1209), in bringing this tax refund suit. This suit challenges the validity of the treasury regulation (26 C.F.R. 1.861-8(e)(3) (1979)) that governs the application of research and development expenses in the computation of the

"combined taxable income" of cross-respondent and its parent (and affiliates) under the foreign sales corporation provisions of the Code. The parties have understood, and agreed, that if this regulation may not validly be applied in this case, the "combined taxable income" of cross-respondent and Boeing would increase, which would cause a *reduction* in the tax liability of petitioners in No. 01-1209 but also cause an increase in the tax liability of Boeing Sales Corporation—the cross-respondent here.

The district court ruled that research and development expenses need not be taken into account in the manner specified by the regulations. Pet. App. 24a. As a result of the district court's ruling, the tax liabilities of petitioners in No. 01-1209 decreased, while those of cross-respondent increased. The parties stipulated to this fact, and proposed a judgment—which the district court entered—that awarded a refund in favor of petitioners in No. 01-1209 in the amount of $419,110,539 and assessed an additional tax obligation against cross-respondent here in the amount of $481,149.

After the government appealed, cross-respondent filed a conditional cross-appeal. In the court of appeals, the parties agreed that the judgment against cross-respondent should be reversed if the government were successful in its appeal. When the court of appeals reversed the judgment in favor of petitioners in No. 01-1209, the court then also reversed the judgment against cross-respondent and "remand[ed] to the district court for further proceedings consistent with this opinion." Pet. App. 14a.

REASONS FOR GRANTING THE CONDITIONAL CROSS-PETITION

The tax liabilities of petitioners in No. 01-1209 and those of cross-respondent are computationally related. A holding that the governing Treasury regulation is invalid would alter the calculation of the "combined taxable income" of petitioners in No. 01-1209 and of cross-respondent here. As reflected in the judgment entered by the district court, that change in the calculation of their "combined taxable income" would, as a computational matter, result in a reduction of the tax liability of the former and an increase in the tax liability of the latter. In the event this Court were to grant the petition in No. 01-1209 and reverse the judgment of the court of appeals as it pertains to the tax liability of petitioners in that case, the judgment entered by the district court against the cross-respondent here should therefore be reinstated.

CONCLUSION

If the petition for a writ of certiorari in No. 01-1209 is granted, this cross-petition should also be granted. If the Court denies the petition in No. 01-1209, this cross-petition should be denied.

Respectfully submitted.

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